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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

No. 72-1276

COLEMAN OIL COMPANY, INC.,
Petitioner

v.

CITIES SERVICE OIL COMPANY,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The jurisdiction of this Court is invoked by the petitioner under 28 USC §1254 (1).

QUESTION PRESENTED

Did the Courts below commit reversible error in accepting the findings of fact of the jury and in ruling as a matter of law that seven gasoline service station leases existing between the petitioner and respondent were valid and binding on said parties.

CORRECTIONS TO STATEMENT OF THE CASE

This is the second instance in which the petitioner, Coleman Oil Company, Inc. (Coleman), has denied the validity of

certain leases in respect of gasoline service station locations owned by Coleman, leased to the respondent, Cities Service Oil Company (Cities), and situated in New Hampshire and Maine. The case had its beginnings in December, 1959, when a dispute arose as to the validity of six of the seven leases now in question. Subsequent to the dispute, Cities filed an action in the District Court for the District of New Hampshire, seeking the enforcement of the leases. In connection with the settlement of the action, Coleman executed a release dated December 14, 1960, acknowledging the validity of six of the seven leases currently in dispute. Subsequently, Coleman executed a release and waiver of defenses dated February 7, 1961, waiving all defenses to the leases then existing between the parties, which include the seven leases currently in dispute.

This dispute between the parties again erupted in 1971, with the eviction of Cities by Coleman from the seven different gasoline service station locations leased by Coleman to Cities. Simultaneously, Cities instituted an action in the United States District Court for the District of New Hampshire, alleging that Coleman violated the terms of the seven valid leases existing between the parties and seeking a permanent injunction against interference by Coleman with the use of the leased premises and money damages for loss of profits and other consequential damages with respect to the period of time in which Cities was wrongfully dispossessed of the leased premises.

Prior to the trial, the Court denied Cities' request for a temporary restraining order and its motion for a preliminary injunction.

At the trial, Coleman admitted that the seven leases in question had been properly executed by the parties and that Cities had never violated any of their terms or conditions. The gist of Coleman's argument was that the leases were invalid as a matter of law pursuant to §1 of the Sherman Act. Further, Coleman argued that the leases were not intended to be leases and that the releases signed by Coleman were signed under duress.

The case was tried before jury on April 6 and 7, 1972. At the close of the evidence, the Court submitted the following three questions to the jury:

(1) Were the leases between the plaintiff [Cities] and defendant [Coleman] a deliberate arrangement by the plaintiff to eliminate and stiflle competition so as to prevent competitive brands of petroleum products from being sold at the gasoline service stations covered by the leases?

(2) Was the stipulation and general release, Exhibits 2 and 3, entered into by the defendant because of duress?

(3) What damages do you find that the plaintiff suffered because the defendant terminated the leases on July 10, 1971?

(a) on a daily basis —

(b) from July 10, 1971, to April 7, 1972 —

(c) none.

After deliberation, the jury answered the first two questions in the negative and determined the plaintiff's damages to be $250.-00 on a daily basis.

Shortly thereafter, the District Court found that the seven leases were valid and enforceable and issued its Rulings and Order which appears as Appendix C to the petition submitted on behalf of Coleman in this case.

Coleman appealed this decision to the United States Court of Appeals for the First Circuit. The First Circuit, in a cogent opinion, affirmed the judgment of the District Court. The appellate decision appears as Appendix A of the petition.

REASONS FOR REFUSING TO GRANT THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE DECISION OF THE COURT OF APPEALS.

A. *THE TWO RELEASES GIVEN BY COLEMAN TO CITIES CONSTITUTE A BAR TO COLEMAN'S DEFENSES.*

No substantial or unresolved federal questions are raised by the petition because the releases and waivers of defenses previously given by Coleman to Cities are dispositive of the case. Accordingly, this Court will not be required to address itself to Coleman's alleged federal claims. A review of the history of this litigation indicates that this point of view has been adopted by both the District Court and the First Circuit Court of Appeals.

The evidence at the trial established that Coleman, under advice of counsel, executed and delivered a release to Cities on December 14, 1960, in settlement of a prior action brought by Cities against Coleman to enforce the terms and conditions of six of the seven leases currently in dispute. Thereafter, a second release was executed by Coleman and delivered to Cities on February 7, 1961. The latter release was also a waiver of any and all defenses to leases existing at that time between the parties. As of February 7, 1961, the date of the second release, all of the leases which are the subject of the instant litigation had been executed and were in full force and effect.

At the trial, Coleman argued that the above releases and waiver of defenses were executed by it because of economic duress, although it conceded that the releases were executed by its president with full corporate authorization. With respect to the issue of duress, the jury, at the trial level, made a specific finding of fact that the releases were not entered into by Coleman because of duress. This finding is amply supported by the evidence which indicated that Coleman had realized a substantial return on its investment in the leased properties and had accumulated considerable equity in the sites. Moreover, Coleman was unable to establish that it could not have negotiated similarly profitable contracts with other national oil companies during the pendency of the previous litigation.

The findings of the jury on the issue of duress were accepted by the trial court. See Appendix C, paragraph No. 1. The Circuit Court of Appeals reached a similar conclusion, as follows:

> The issue of duress was a factual question for determination by the jury, and we find no reason to overturn its verdict. The releases are therefore fully binding upon Cole-

man, and act as a bar to the defenses it now seeks to assert. Appendix A, pp. 5-6.

The conclusion of the First Circuit that the releases act as a bar to Coleman's defenses is amply supported in case authority. As early as 1824, the New Hampshire Supreme Court held that a release constituted a bar to an action. *See Kimball v. Wilson*, 3 N.H. 96 (1824). Cases in other jurisdictions have reasoned that a release operates as an absolute bar. *See, e.g., Mannke v. Benjamin Moore & Co.*, 375 F.2d 281 (3d Cir. 1967); *Hoffland v. Gustafson*, 282 P.2d 1039 (Cal. 1955); and *Mangini v. McClurg*, 249 N.E.2d 386, 24 N.Y.2d 556, 301 N.Y.S.2d 508 (1969). Accordingly, the releases and waiver of defenses operate as a complete bar to the defenses asserted by Coleman.

B. *COLEMAN HAS WAIVED ITS DEFENSES BASED ON §2 OF THE SHERMAN ACT AND §3 OF THE CLAYTON ACT SINCE IT DID NOT PROPERLY RAISE AND ARGUE THESE DEFENSES AT THE TRIAL LEVEL.*

Initially, it may be helpful to focus upon the antitrust claims properly preserved by Coleman at the trial court level for argument on appeal. During the trial, the Court and counsel for Coleman engaged in the following dialogue:

> The Court: Now, Mr. Borenkind, you claim that this is illegal because, really, of the first sentence of paragraph one of section one of the antitrust act, which provides that every contract in restraint of trade or commerce among the several states or foreign nations is declared to be illegal.
>
> Mr. Borenkind: Yes.
>
> The Court: What has section two got to do with it?
>
> Mr. Borenkind: No, no, section one, the restraint of trade, and section two, contracts and conspiracy.
>
> The Court: Every person who shall monopolize or conspire with any other person, and so forth. I don't think that section two applies.
>
> Mr. Borenkind: No, it is section one.
>
> The Court: Alright.

> Mr. Borenkind: I'm sorry, I was confused as to sections one and two. *See* Record, Vol. II, pp. 167-68.

Since Coleman keyed its attack on the leases to §1 of the Sherman Act, the First Circuit concluded thusly in a footnote:

> Coleman also argues on appeal [in addition to the §1 claim] that the leases contravened §2 of the Sherman Act and §3 of the Clayton Act. These sections were not raised below, and appellant is therefore precluded from relying upon them here. Appendix A, p. 6, n.4.

It is axiomatic that, as a general rule, the Supreme Court on certiorari will not review issues not raised or properly preserved below by the petitioner. *E.g., Michel v. Louisiana,* 350 U.S. 91 (1955), *rehearing denied,* 350 U.S. 955 (1956); *Desper v. Starved Rock Ferry Co.,* 342 U.S. 187, *rehearing denied,* 342 U.S. 934 (1952); and *Lanasa Fruit S.S. & Importing Co. v. Universal Ins. Co.,* 302 U.S. 556 (1938). For example, the Supreme Court has refused to consider the merits of claims not disposed of by the Circuit Court of Appeals. *Calmar S.S. Corp. v. United States,* 345 U.S. 446, 456 (1953).

Thus, the only defense based upon the federal antitrust statutes which Coleman properly preserved is its §1 Sherman Act claim.

C. EVEN IF THE RELEASES ARE NOT A BAR TO COLEMAN'S §1 SHERMAN ACT CLAIM, THIS DEFENSE IS NOT AVAILABLE TO COLEMAN AS A MATTER OF LAW.

The petitioner in the instant case has taken the paradoxical position that seven leases, to which it has been a party for as many as seventeen years and pursuant to which it has enjoyed substantial economic benefit, are now null and void as violative of §1 of the Sherman Act. This position overlooks, however, the question of whether §1 of the Sherman Act can operate as a defense to a contract action.

The Supreme Court, in *Kelly v. Kosuga,* 358 U.S. 516 (1959), considered the following issue:

> [Whether] the petitioner's pleaded defense of illegality

> under the Sherman Act [is a defense] to this action to enforce the terms of a sale made under state law. *Id.* at 518.

It determined that such a defense was unavailable to the petitioner since:

> [i]f the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, it must be said that his theory creates a very strange class of private attorneys general. *Id.* at 520.

The Court noted that the defense of illegality under the Sherman Act was not favored by the Courts and discussed, in this regard, *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902) and *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165 (1915).

The basis for this disfavor is the possibility, such as evidenced by the case at bar, that a party to a contract would enjoy its benefits but subsequently avoid its obligations by claiming an antitrust defense. This theory was articulated in *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971), in which the First Circuit rejected a Sherman Act defense to a contract. The First Circuit reasoned:

> In this case, appellant accepted employment under the allegedly illegal contract and raised the antitrust question only when it no longer suited him to comply with his agreement. *Id.* at p. 786.

The persuasiveness of the First Circuit's reasoning in *Dickstein* becomes readily apparent in light of the factual circumstances of the instant case. In June of 1971, when Coleman claimed the leases were invalid as violative of §1 of the Sherman Act, it had enjoyed the benefits of the leases for periods ranging from twelve to seventeen years. Moreover, the president of Coleman testified at the trial that his reason for evicting Cities stemmed from a better financial arrangement offered to him by American Oil Company. *See* Record, Vol. II, at p. 104.

Assuming, then, that the releases are not a bar to Coleman's defense, its Sherman Act §1 defense is unavailable to it as a matter of law in accordance with established case authority.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

In its brief, the petitioner argues that the decision of the First Circuit in the instant case is in conflict with *Hoopes v. Union Oil Company of California*, 374 F.2d 480 (9th Cir. 1967) and *Simpson v. Union Oil Company of California*, 377 U.S. 13, *rehearing denied*, 377 U.S. 949 (1964). Even a cursory reading of the aforementioned decisions will lead to the conclusion that the petitioner's contention is without merit.

Prior to analyzing *Hoopes* and *Simpson*, however, a review of the business relationship between the parties would be useful. Coleman commenced the distribution of Cities products as a wholesale distributor in 1941 and received compensation based upon a commission arrangement. Some years thereafter, Coleman purchased with its own funds parcels of land which were ultimately developed as gasoline service station locations. Coleman negotiated loans from independent financial institutions to be secured by mortgages on the real estate. Additionally, Coleman executed and delivered leases of the property to Cities and assigned the lease rentals to the lender. The leases contained renewal provisions and purchase options which enabled Cities to acquire the property for a sum of money negotiated by the parties before the execution of the leases and which were incorporated into the leases. Upon completion of the improvements, the stations were sublet by Cities to service station operators. Coleman, in turn, acted as the Cities distributor to these sites and realized gain, in the form of commissions, on sales of products to the operators.

Petitioner's contention that the leases described above were not leases but rather some form of convoluted security arrangements was rejected by the District Court (Appendix C, paragraph 2) and the First Circuit (Appendix A, p. 6). The First Circuit succinctly stated its conclusion as follows:

> If [Coleman's] theory that the leases were actually intended

> as security agreements were to be accepted, the renewal and purchase options contained therein would be rendered totally meaningless. This fact alone provides more than adequate support for the court's decision. *Id.*

Coleman's position in connection with the nature of the leases constitutes a make-weight argument at best with no basis in fact.

Given the above factual situation, however, Coleman further contends that the decision below is in conflict with *Hoopes* and *Simpson*. It is fair to state that *Hoopes* has been the cornerstone of Coleman's position throughout the instant litigation. But as the First Circuit noted, *Hoopes* "is inapposite for several reasons. . . ." *Id.* at 7.

The *Hoopes* case involved an appeal by the plaintiffs, owners of a service station, of the granting of a motion for summary judgment in favor of the defendant, an oil company. The issue on appeal was whether the oil company's lease-leaseback arrangement presented a question of fact for the jury which precluded a summary judgment in favor of the oil company. The Court decided that the entry of summary judgment was premature and therefore reversed. Contrary to the contention of the petitioner in the instant case, the *Hoopes* decision did not hold illegal the lease-leaseback arrangement; the *Hoopes* court merely held that an issue of fact should have been presented to the jury. Accordingly, the precedential value of the *Hoopes* case for any proposition of substantive law is minimal.

Furthermore, in *Hoopes*, the plaintiffs, who were owners of a service station, appealed the denial of the motion for summary judgment. The Court upheld the denial on the grounds that exclusive dealing arrangements are not *per se* illegal. *Hoopes v. Union Oil Company of California*, 374 F.2d 480, 486 (9th Cir. 1967), *citing, Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 333, 335 (1961). Therefore, the *Hoopes* decision may be cited as supportive authority in opposition to petitioner's apparent legal argument.

Other distinctions between the *Hoopes* decision and the instant case can be pointed out. For example, in *Hoopes* the oil company engineered a lease-leaseback arrangement which purportedly was a restraint on trade. In the instant case, the

contracts before the Court are not lease-leaseback arrangements but standard form leases as acknowledged by Coleman's president in his testimony at trial. *See* Record, Vol. II, p. 66. Therefore, the *Hoopes* decision is not in conflict with the First Circuit decision in the instant case.

A similar conclusion is reached upon an examination of *Simpson v. Union Oil Company of California*, 377 U.S. 13, *rehearing denied*, 377 U.S. 949 (1964). In *Simpson*, a service station operator brought a private, treble damage antitrust action against its lessor, which was a national oil company. The complaint alleged that the consignment agreement between the parties, pursuant to which the plaintiff marketed defendant's gasoline, constituted an illegal resale price maintenance agreement. The plaintiff alleged that he sold gasoline at 27.9 cents per gallon although the defendant had set a minimum price of 29.9 cents per gallon. The Court concluded that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. *Id.* at p. 17.

Although the distinctions between *Simpson* and the instant case are many, the primary difference is that the danger of price-fixing was at the core of *Simpson*, while in the case at bar, no argument has been raised with respect to price-fixing or illegal resale price maintenance agreements. In *Simpson*, the thrust of the dispute was the ability of the plaintiff to sell at a price he determined to be economically feasible. In the instant case, on the other hand, the dispute revolves around the validity of seven standard-form real estate leases, without any mention by Coleman of alleged price-fixing.

Additionally, since the plaintiff in *Simpson* brought a private, treble-damage action against the defendant, the policy considerations are markedly different from the case at bar. As previously discussed, the use of an antitrust defense to a contract is not favored, and therefore, the public policy considerations are substantially changed. Accordingly, the First Circuit's decision below is not in conflict with *Simpson*.

III.

ASSUMING THE MERITS OF THE DEFENSES

ARGUED BY COLEMAN CAN PROPERLY BE REACHED, IT HAS NOT ESTABLISHED A §1 SHERMAN ACT VIOLATION.

After stating that a contract may be violative of §1 of the Sherman Act when (a) it constitutes a *per se* violation or (b) an unreasonable restraint of trade is its object or effect, the First Circuit affirmed the findings of the District Court that Coleman had not established a violation of the Sherman Act. Appendix A, pp. 7-8.

Petitioner's argument that the leases are illegal *per se* is twofold. First, it contends the leases constitute a *per se* violation of the Sherman Act because they allegedly are exclusive dealing arrangements. As was stated by the *Hoopes* court, however, "[e]xclusive dealing arrangements are not *per se* illegal." *Hoopes v. Union Oil Company of California,* 374 F.2d 480, 486 (9th Cir. 1967). *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320 (1961); *Standard Oil Co. v. United States,* 337 U.S. 293 (1949). The petitioner's position on this point is therefore in conflict with established case authority and should not merit review by this Court.

A similar result should also be reached in connection with the petitioner's contention that the leases constitute an illegal tying arrangement. *See Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495 (1969). The First Circuit rejected this "imaginative" argument and concluded that the business relationship between the parties represented "a rational and mutually profitable scheme for the development of service station sites." Appendix A, p. 7 n.5.

In order to succeed on its tying arrangement argument, the petitioner must clear three hurdles, any one of which would be fatal to its contention. First, petitioner claims that the "tying product" was the extension of credit to it by independent lenders. Petition, p. 16. Since Cities was totally unrelated to the lending institutions, the *Fortner* case is distinguishable. In reality, the extension of credit which was the alleged "tying product" was within the sole control of the unrelated lending institutions and beyond the influence of Cities. Thus, since Cities had no control or dominance over the alleged tying

product, there could be no effective pressure exerted on buyers to take the tied items. *See Northern Pacific R. Co. v. United States,* 356 U.S. 1, 6 (1958).

Secondly, the evidence indicates that Coleman has acted as a wholesale distributor of Cities Service products since 1941. Yet, the oldest lease being challenged in this action was executed on April 14, 1954. During the thirteen year period between the two aforementioned dates, therefore, Coleman supplied retail operators with Cities' products. This thirteen year period of voluntary and mutually profitable business relations between the parties certainly weakens Coleman's present contention that it was compelled to purchase Cities petroleum products (the "tied product") by reason of the availability of the extension of credit (the "tying product").

Thirdly, the First Circuit concluded that Coleman had failed to demonstrate at the trial that the credit terms offered by the independent lending institutions were in any way unique or unusually advantageous. Accordingly,

> the failure to show any market power whatever in the "tying product" is fatal to Coleman's argument that the lease arrangements constituted a *per se* violation of the statute. *Compare Fortner, supra,* at 504-05. (Citation in the original). Appendix A, p. 7 n.5.

Perhaps the most basic point to be made, however, is that the jury answered the following question in the negative:

> Were the leases between the plaintiff and defendant a deliberate arrangement by the plaintiff to eliminate and stifle competition so as to prevent competitive brands of petroleum products from being sold at the gasoline service stations covered by the leases?

The specific jury finding that no such deliberate arrangement in restraint of competition existed is an insuperable hurdle to Coleman's position that the object of the lease arrangement was an unreasonable restraint of trade.

With respect to the issue of whether the lease arrangement had the effect of an unreasonable restraint of trade, no evidence was introduced at the trial which would support Coleman's ar-

gument. To the contrary, the record reveals that competition in both the product and geographical markets increased markedly from the date of the inception of the leases. Appendix A, p. 8 n.6.

Based upon an application of the law to the record, it is submitted by Cities that, assuming Coleman's antitrust defenses can be reached, they are totally without merit.

CONCLUSION

The instant case is inappropriate for a writ of certiorari for many reasons. Initially, the petitioner is barred from asserting its antitrust defenses due to the releases and waiver of defenses it signed in settlement of the prior litigation. Assuming, however, that the releases do not constitute such a bar, the defenses are not available to the petitioner pursuant to the *Kelley v. Kosuga* decision.

In its petition, Coleman has cited no authority in conflict with the decision below. Rather, the *Hoopes* case, which is the cornerstone of the petitioner's argument, is distinguishable for several reasons and may even be cited for the proposition that exclusive dealing arrangements are not illegal *per se*.

Even if the merits of the petitioner's antitrust defenses could properly be reached, the record fails to reveal any violation of the antitrust laws. The jury considered the intent of the lease arrangements and found no anticompetitive intent. Additionally, the failure to show any market power in the alleged tying product and the undisputed evidence in the record that competition in the relevant market increased substantially leads to the inescapable conclusion that the leases in question do not violate §1 of the Sherman Act.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Dudley W. Orr, Esquire
95 North Main Street
Concord, New Hampshire 03301
Counsel for Respondents

April 6, 1973